CHAPTER 8

COLLATERAL REVIEW OF COURTS-MARTIAL

8.1 Introduction.

a. Of all military activities, courts-martial historically have been the subject of the earliest civilian court review. Federal courts, however, have never exercised a power of general supervision and control over the military justice system. Courts-martial are constitutionally separate from the federal judiciary. "[A] military tribunal is an Article I legislative court with jurisdiction independent of the power created and defined by Article III."[1] Indeed, until the Military Justice Act of 1983, which provided for discretionary Supreme Court review of decisions of the Court of Military Appeals,[2] courts-martial were not directly reviewable by any federal court. Instead, courts-martial could only be challenged indirectly, through collateral proceedings such as habeas corpus, back pay claims, and suits for money damages for various common law torts connected with the enforcement of court-martial sentences. Moreover, as the Supreme Court will directly consider very few cases under the Military Justice Act of 1983, most future federal court intervention in military court proceedings is likely to be collateral in nature.

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[1]Gosa v. Mayden, 413 U.S. 665, 686 (1973).

[2]Pub. L. No. 98-209, §10, 97 Stat. 1393 (1983) (codified at 28 U.S.C. §1259). The argument has been raised that this legislation, authorizing direct review of Court of Military Appeals decisions, precludes all collateral review of courts-martial. The Courts have soundly rejected the argument. See Matias v. United States, 923 F.2d 821 (Fed. Cir. 1990); Machado v. Commanding Officer, 860 F.2d 542 (2d Cir. 1988).

b. This chapter considers federal judicial review of courts-martial in collateral proceedings, including the threshold for and scope of review, the doctrine of exhaustion of military judicial remedies, and the doctrine of waiver. First, however, it is important to understand the historical development of the still-evolving role of the federal courts in the military justice system.

8.2 Historical Overview.

a. General. From a historical perspective, the relationship between the civilian courts and the military justice system fits relatively neatly into three distinct periods. Until World War II, collateral challenges were limited to questions of technical jurisdiction. Beginning in 1943, lower federal courts began reviewing the constitutional claims of persons convicted by courts-martial. This expansion of the scope of review, which was consistent with developments in civilian habeas corpus, culminated with the Supreme Court's landmark decision in Burns v. Wilson.[3] In Burns, the Supreme Court recognized that constitutional claims were subject to review in collateral challenges to military court convictions. Finally, the post-Burns era, from 1953 to the present, has been marked by a lack of uniformity in federal court decisions about the proper limits of review of court-martial proceedings.

b. Collateral Review Before World War II.

(1) Early English Experience. The evolution of the relationship between the English common law and military courts is intertwined with the complex and historic struggles between the Crown and Parliament, and between the common

[3]346 U.S. 137 (1953).

law courts and other rival courts.[4] Parliament and the common law courts strove to limit the jurisdiction of military tribunals. The preference was for trial in the common law courts, especially in time of peace.[5] For example, in 1322, a military court composed of King Edward II and various noblemen condemned Thomas, Earl of Lancaster, to death.[6] Parliament reversed the judgment in 1327,[7] on the ground "'that in time of peace no man ought to be adjudged to death for treason or another offense without being arraigned and held to answer; and that regularly when the King's courts are open it is a time of peace in judgment of law."'[8] Despite this preference for civilian courts, however, common law court intervention into the proceedings of military tribunals was relatively confined. Generally, review was limited to ensuring that the military tribunal did not exceed its jurisdiction.[9]

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[4]Duker, The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame, 53 N.Y.U. L. Rev. 983, 1007, 1015-25, 1025-36, 1042-54 (1978); Schlueter, The Court-Martial: An Historical Survey, 87 Mil. L. Rev. 129, 139-44 (1980); Developments in the Law--Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1045 (1969) [hereafter Developments].

[5]M. Hale, The History of the Common Law of England 25 (3d ed. London 1739) (1st ed. London 1713); C. Walton, History of the British Standing Army 532 (1894).

[6]1 W. Blackstone, Commentaries, at 413.

[7]Id.

[8]Ex parte Milligan, 71 U.S. (4 Wall.) 2, 128 (1866). See E. Coke, 3 Institutes, at 52 (quoted in S. Adye, A Treatise on Courts-Martial 50 (8th ed. London 1810) (1st ed. London 1769)) ("[I]f a lieutenant or other, that hath commission of martial law, doth, in time of peace, hang or otherwise execute any man, by colour of martial law, this is murder, for it is against the Magna Charta").

[9]See, e.g., Barwis v. Keppel, 95 Eng. Rep. 831, 833 (K.B. 1766); Grant v. Gould, 126 Eng. Rep. 434, 451 (C.P. 1792); The King v. Suddis, 102 Eng. Rep. 119, 123 (K.B. 1801); Mann v. Owen, 109 Eng. Rep. 22 (K.B. 1829).

(2) Collateral Review in America Before the Civil War. Before the Civil War, few collateral challenges to military proceedings were brought in the federal courts.[10] Not until 1879 did the Supreme Court receive its first case involving a petition for habeas relief from a court-martial sentence.[11] In an early habeas corpus decision not involving military proceedings, however, the Court presaged the scope of review it would employ by declaring that the substantive principles governing the writ of habeas corpus would be those established by the common law.[12] Thus, review was limited to questions of jurisdiction.[13] The earliest challenges to courts-martial to reach the Supreme Court were actions to recover damages or property. In these cases, the Supreme Court limited its review to determining whether the courts-martial had

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[10]Rosen, Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial, 108 Mil. L. Rev. 5, 20 (1985). During the first half of the 19th Century, state courts were the principal forum for collateral attacks on courts-martial. Id. at 24-27. State courts heard both damages claims arising from court-martial proceedings, e.g., Loomis v. Simons, 2 Root (Conn.) 454 (1796); Hickey v. Huse, 57 Me. 493 (1869); Rathburn v. Martin, 20 Johns. (N.Y.) 343 (1823); Duffield v. Smith, 3 Serg. & Rawle (Pa.) 190 (1818); Barnett v. Crane, 16 Vt. 246 (1844), and habeas corpus challenges to the sentences of confinement imposed by military courts. E.g., Ex parte Anderson, 16 Iowa 595 (1864); In the Matter of Carlton, 7 Cow. (N.Y.) 471-72 (1827); Husted's Case, 1 Johns. (N.Y.) 136 (1799); State v. Dimmick, 12 N.H. 197 (1841); Commonwealth ex rel. Webster v. Fox, 7 Pa. 336 (1847). The Supreme Court, in two Civil War-era cases, ended the state courts' habeas jurisdiction over petitioners in federal custody. In re Tarble, 80 U.S. (13 Wall.) 397 (1871); Ableman v. Booth, 62 U.S. (21 How.) 506 (1858).

[11]Ex parte Reed, 100 U.S. 13 (1879).

[12]Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93 (1807).

[13]See, e.g., Ex parte Parks, 93 U.S. 18, 22-23 (1876); Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830).

jurisdiction.[14] Lower federal courts similarly refused to look beyond the jurisdiction of the military courts.[15]

(3) Collateral Review in America From the Civil War to World War II.

(a) With the Civil War, the number of federal collateral challenges to the proceedings of military tribunals filed in the federal courts increased dramatically.[16] Growth, however, did not mean change.[17] In virtually all of the collateral challenges brought between the Civil War and World War II, federal courts limited their review to a search for technical jurisdiction.[18]

(b) Review of the technical jurisdiction of courts-martial consisted of four different aspects. First, federal courts reviewed courts-martial to

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[14]Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827); Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806).

[15]See, e.g., In re Biddle, 30 F. Cas. 965 (C.C.D.D.C. 1855) (No. 18,236).

[16]Rosen, supra note 10, at 28.

[17]Id.

[18]See, e.g., Hiatt v. Brown, 339 U.S. 103, 111 (1950); Collins v. McDonald, 258 U.S. 416, 418 (1922); Givens v. Zerbst, 255 U.S. 11, 19-20 (1921); Mullan v. United States, 212 U.S. 516, 520 (1909); Carter v. McClaughry, 183 U.S. 365, 380-81 (1902); Swaim v. United States, 165 U.S. 553, 555 (1897); United States v. Grimley, 137 U.S. 147, 150 (1890); Smith v. Whitney, 116 U.S. 167, 176-77 (1886); Wales v. Whitney, 114 U.S. 564, 570 (1885); Keyes v. United States, 109 U.S. 336, 339 (1883); Ex parte Reed, 100 U.S. 13, 23 (1879).

determine whether the tribunal had jurisdiction over the offense.[19] Second, the courts entertained collateral challenges to the personal jurisdiction of courts-martial.[20] Third, federal courts would collaterally review military proceedings to ensure the courts-martial were lawfully convened and constituted.[21] Fourth, the courts could collaterally review court-martial proceedings to ascertain whether sentences adjudged were duly approved and authorized by law.[22]

(c) Before World War II, the federal courts rarely ventured beyond the four aspects of technical jurisdiction. Thus, the civil courts would not review claims of mere errors or irregularities in the proceedings of courts-martial,[23] or matters of defense,[24] or alleged constitutional defects in the military proceedings.[25]

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[19]See, e.g., Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Crouch v. United States, 13 F.2d 348 (9th Cir. 1926); Anderson v. Crawford, 265 F. 504 (8th Cir. 1920); Meade v. Deputy Marshall, 16 F. Cas. 1291 (C.C.D. Va. 1815) (No. 9,372).

[20]See, e.g., Kahn v. Anderson, 255 U.S. 1 (1921); Johnson v. Sayre, 158 U.S. 109 (1895); Morrissey v. Perry, 137 U.S. 157 (1890).

[21]See, e.g., Givens v. Zerbst, 255 U.S. 11 (1921); United States v. Brown, 206 U.S. 240 (1907); McClaughry v. Deming, 186 U.S. 49 (1902); Swaim v. United States, 165 U.S. 553 (1897).

[22]Runkle v. United States, 122 U.S. 543 (1887); Stout v. Hancock, 146 F.2d 741 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945); In re Brodie, 128 F. 665 (8th Cir. 1904); Rose ex rel. Carter v. Roberts, 99 F. 948 (2d Cir.), cert. denied, 176 U.S. 684 (1900).

[23]See, e.g., Mullan v. United States, 212 U.S. 516 (1908) (evidentiary errors); Swaim, 165 U.S. at 553 (evidentiary errors, hostile member on court).

[24]See, e.g., Romero v. Squier, 133 F.2d 528 (9th Cir.), cert. denied, 318 U.S. 785 (1943) (entrapment); Aderhold v. Menefee, 67 F.2d 345 (5th Cir. 1933) (self-defense).

c. Collateral Review From 1941-1953.

(1) General. With the onset of World War II, some lower federal courts began broadening the issues cognizable in collateral attacks on courts-martial to include constitutional claims.[26] Although this expansion was attributable to a number of factors,[27] it was principally in response to the parallel enlargement of collateral review of criminal cases in the civilian sector.[28]

(2) Development of Civilian Habeas Corpus. Until the early 20th century, the scope of review employed by the federal courts in collateral challenges to civilian criminal convictions roughly mirrored the review afforded in attacks on military convictions.[29] Starting in 1915, the issues cognizable in civilian cases began to broaden. In four decisions--Frank v. Mangum,[30] Moore v. Dempsey,[31] Johnson v. Zerbst,[32]

(..continued)

[25]See, e.g., Collins v. McDonald, 258 U.S. 416 (1922) (self-incrimination); Sanford v. Robbins, 115 F.2d 435 (5th Cir.), cert. denied, 312 U.S. 697 (1940) (double jeopardy).

[26]See Rosen, supra note 10, at 37-38.

[27]Id. at 38.

[28]Fratcher, Review by Civil Courts of Judgments of Federal Military Tribunals, 10 Ohio St. L.J. 271, 293-95 (1949); Katz & Nelson, The Need for Clarification in Military Habeas Corpus, 27 Ohio St. L.J. 193, 200-02 (1966); Snedeker, Habeas Corpus and Court-Martial Prisoners, 6 Vand. L. Rev. 288, 296-97 (1953).

[29]See, e.g., In re Moran, 203 U.S. 96 (1906); Ex parte Bigelow, 113 U.S. 328 (1885); Ex parte Parks, 93 U.S. 18 (1876); Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830).

[30]237 U.S. 309 (1915).

[31]261 U.S. 86 (1923).

Waley v. Johnston,[33] the Supreme Court gradually expanded the scope of review to include constitutional issues. However, these issues were not subject to de novo examination. Instead, the federal courts would limit their review to determining whether the issues were "fully and fairly considered" in the state criminal proceedings.[34]

(3) Expansion of Collateral Review of Military Cases in the Lower Federal Courts. Influenced by the developments in the civilian sector, some lower federal courts broadened the scope of their inquiry in collateral attacks on military convictions to include constitutional claims.[35] Yet this expansion was by no means uniform. Some federal courts adhered to the traditional scope of review--jurisdiction.[36] Others, including the Supreme Court, explicitly avoided the issue.[37]

d. Burns v. Wilson, 346 U.S. 137 (1953).

(..continued)

[32]304 U.S. 458 (1938).

[33]316 U.S. 102 (1942).

[34]See, e.g., Ex parte Hawk, 321 U.S. 114, 118 (1948). See also Rosen, The Great Writ--A Reflection of Societal Change, 44 Ohio St. L.J. 337, 346 (1983) [hereafter The Great Writ].

[35]See, e.g., Montalvo v. Hiatt, 174 F.2d 645 (5th Cir.), cert. denied, 338 U.S. 874 (1949); Benjamin v. Hunter, 169 F.2d 512 (10th Cir. 1948); United States ex rel. Weintraub v. Swenson, 165 F.2d 756 (2d Cir. 1948); United States ex rel. Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); Schita v. King, 133 F.2d 283 (8th Cir. 1943); Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).

[36]See, e.g., United States ex rel. Innes v. Crystal, 131 F.2d 576 (2d Cir. 1943); Ex parte Benton, 63 F. Supp. 808 (N.D. Cal. 1945); Ex parte Potens, 63 F. Supp. 582 (E.D. Wis. 1945).

[37]See, e.g., Wade v. Hunter, 336 U.S. 684 (1949); Romero v. Squier, 133 F.2d 528 (9th Cir.), cert. denied, 318 U.S. 785 (1943).

(1) The Supreme Court's break with the traditional limits of collateral review came with its decision in Burns v. Wilson.[38] The case involved two petitions for habeas corpus by co-accused--Burns and Dennis--who were separately tried and convicted by general court-martial for rape and murder on the island of Guam. The courts had sentenced both petitioners to death. After exhausting their military remedies, the petitioners sought habeas relief in the federal courts. Neither petitioner controverted the technical jurisdiction of their courts-martial. Instead, each rested his petition on various constitutional infirmities. The lower courts dismissed both petitions. Although the Supreme Court affirmed the disposition of the claims, it held that the federal courts could review the petitioner's constitutional challenges. The Court limited the scope of the inquiry, however, to a review of whether the military courts had fully and fairly considered the constitutional claims. The Court held that "had the military courts manifestly refused to consider [the petitioners'] claims, the District Court was empowered to review them de novo."[39] But where, as in the case before it, the military tribunals had heard the petitioners out on every significant allegation, "it is not the duty of the civil courts to simply repeat that process. . . . It is the limited function of the civil courts to determine whether the military has given fair consideration to each of these claims."[40]

(2) Earlier in the same term in which it decided Burns, the Supreme Court issued its landmark civilian habeas corpus decision in Brown v. Allen.[41] Allen is

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[38]346 U.S. 137 (1953).

[39]Id. at 142.

[40]Id. at 144.

[41]344 U.S. 443 (1953).

significant because it abandoned the "full and fair consideration" limitation on the review of constitutional issues in collateral challenges to state criminal convictions. The Court held that, while the federal courts may accept a state court's determination of factual issues, it cannot accept as binding state adjudications of questions of law.[42] 'The state court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.'[43]

(3) Nine years after Allen, the scope of federal court review of state criminal proceedings hit its highwater mark in Townsend v. Sain,[44] Townsend not only required federal courts to independently review all state court decisions on constitutional issues, but also "to relitigate questions of fact whenever 'there is some indication the state process has not dealt fairly or completely with the issues.'"[45]

(4) These developments in civilian habeas jurisprudence are important because they influenced the manner in which federal courts were to treat the Burns" full and fair consideration" test. Federal courts were reluctant to afford greater deference to military criminal proceedings than those in the civilian sphere. And just as the developments in the law of civilian habeas corpus before World War II influenced

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[42]Id. at 506.

[43]Id. at 508.

[44]372 U.S. 293 (1963).

[45]The Great Writ, supra note 34, at 351, quoting Developments, supra note 4, at 122. Townsend was partially overruled in Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). Keeney held that a habeas petitioner is entitled to a federal evidentiary hearing only if he can show cause for his failure to properly develop the material facts in the state criminal proceedings and actual prejudice resulting from that failure, or if he can show that a fundamental miscarriage of justice would result from failure to hold such a hearing.

military habeas review, the expansion of the writ in the 1950s and 1960s undoubtedly colored the federal courts' perception of the proper scope of review in military cases.[46]

8.3 Scope of Collateral Review.

a. The Demise of Burns v. Wilson. Until about 1970, most federal courts strictly applied the Burns test of "full and fair" consideration and refused to review either the factual or legal merits of constitutional claims litigated in the military courts.[47] This approach focused on whether the military courts "manifestly refused" to consider a petitioner's constitutional claims. While a few courts still adhere to the Burns approach, notably the United States Court of Appeals for the Tenth Circuit,[48] most courts do not. Because of a number of factors, including the broadened scope of civilian habeas corpus and the failure of the Supreme Court to apply the Burns test since 1953, most federal courts have devised their own standard of collateral review. The result has been a divergence in approach to collateral challenges to court-martial convictions among the lower federal courts.

b. Current Approaches to Collateral Review.

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[46]See Rosen, supra note 10, at 66.

[47]See, e.g., United States ex rel. Thompson v. Parker, 399 F.2d 774 (3d Cir. 1968), cert. denied, 393 U.S. 1059 (1969); Palomera v. Taylor, 344 F.2d 937 (10th Cir.), cert. denied, 382 U.S. 946 (1965); Reed v. Franke, 297 F.2d 17 (4th Cir. 1961); Bourchier v. Van Metre, 223 F.2d 646 (D.C. Cir. 1955); Swisher v. United States, 237 F. Supp. 921 (W.D. Mo. 1965), aff'd, 354 F.2d 472 (8th Cir. 1966); Begalke v. United States, 286 F.2d 606 (Ct. Cl.), cert. denied, 364 U.S. 865 (1970).

[48]See, e.g., Lips v. Commandant, U.S. Disciplinary Barracks, 997 F.2d 808 (10th Cir. 1993), cert. denied, 114 S. Ct. 920 (1994); Khan v. Hart, 943 F.2d 1261 (10th Cir. 1991); Dodson v. Zelez, 917 F.2d 1250 (10th Cir. 1990); Watson v. McCotter, 782 F.2d 143 (10th Cir.), cert. denied, 476 U.S. 1184 (1986).

(1) General. The federal courts generally agree about what issues are reviewable in collateral challenges to courts-martial: issues of jurisdiction and constitutional questions.[49] Other issues are not reviewable.[50] The courts are not in agreement, however, about the proper scope of review of these issues--especially constitutional claims--or the deference federal courts should give to military court determinations.

(2) As noted above, a few courts--principally those in the Tenth Circuit--still follow the Burns v. Wilson "full and fair" consideration test.[51] The significance of the Tenth Circuit's adherence to Burns should not be underestimated; the United States Disciplinary Barracks at Fort Leavenworth, Kansas, is in the Tenth Circuit. Thus, Tenth Circuit precedent will govern many (if not most) of the petitions for habeas corpus filed by military prisoners. Watson v. McCotter provides an example of the Tenth Circuit's restrictive approach to collateral attacks on courts-martial.

WATSON v. McCOTTER
782 F.2d 143 (10th Cir.),
cert. denied, 476 U.S. 1184 (1986)

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[49]See, e.g., United States v. Augenblick, 393 U.S. 348 (1969); Relford v. Commandant, 401 U.S. 355 (1971).

[50]See, e.g., Hatheway v. Sec'y of Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981); Calley v. Callaway, 519 F.2d 184 (5th Cir.) (en banc), cert. denied, 425 U.S. 911 (1975). See generally United States ex rel. Searcy v. Greer, 768 F.2d 906, 910 (7th Cir.), cert. denied, 474 U.S. 996 (1985).

[51]But see Monk v. Zelez, 901 F.2d 885, 888 (10th Cir. 1990) (purporting to adhere to the deferential Burns test, but permitting review of constitutional claims fully considered by military courts in "appropriate cases," i.e., where the issue is "substantial and largely free of factual questions.").

Before HOLLOWAY, Chief Judge, LOGAN, Circuit Judge, and WINDER, District Judge.

LOGAN, Circuit Judge.

This appeal is from the district court's summary dismissal of petitioner Michael C. Watson's application for writ of habeas corpus filed under 28 U.S.C. §2241. Watson currently is serving a ten-year court-martial sentence for rape and forcible sodomy, violations of Articles 120 and 125 of the Uniform Code of Military Justice, 10 U.S.C. §§920, 925.

The district court dismissed the petition, without issuing an order to show cause or holding an evidentiary hearing, on the ground that the military tribunals previously had given "full and fair consideration" to Watson's ineffective assistance of counsel claim, despite the absence of any evidentiary hearing on the issue by a military court.

Watson was convicted in 1981 before a general court-martial. He appealed his conviction to the Army Court of Military Review on due process and ineffective assistance of counsel grounds; after a hearing that court affirmed his conviction and sentence. The United States Court of Military Appeals denied further review.

Watson then filed this application for a writ of habeas corpus, a supporting brief, and a request for a hearing in the United States District Court for the District of Kansas, the district in which he is imprisoned. He again raised ineffective assistance of counsel and due process challenges to his confinement. Two days after this filing, the district court sua sponte denied the writ. This appeal raises only the ineffective assistance claim.

When a military decision has dealt "fully and fairly" with an allegation raised in a habeas petition, "it is not open to a federal civil court to grant the writ simply to reevaluate the evidence." Burns v. Wilson, 346 U.S. 137, 142, 73 S. Ct. 1045, 1048, 97 L.Ed. 1508 (1953) (plurality opinion). In Burns the district court had dismissed the petitioners' application for habeas corpus without hearing evidence, because it was satisfied that the court-martial had jurisdiction over the prisoners, crimes, and sentences. Id. at 138, 73 S. Ct. at 1046. The court of appeals gave the petitioners' claims full consideration on the merits; it reviewed the evidence in the trial record and other military court proceedings before deciding to uphold the convictions. Id. at 139, 73 S. Ct. at 1047. In reviewing these actions, the Supreme Court was willing to expand the scope of review available in federal courts slightly beyond purely jurisdictional concerns, but it found that the court

of appeals had gone too far. Id. at 146, 73 S. Ct. at 1050. The petitioners had failed to show that the military review was "legally inadequate" to resolve their claims. Id. Without such a showing, the federal court could not reach the merits. Id.

In Burns the military review of the case had included review by the Staff Judge Advocate, a decision of the Board of Review in the office of the Judge Advocate General, a decision of the Judicial Council in the Judge Advocate General's office after briefs and oral argument, a recommendation by the Judge Advocate General, an action by the President confirming the sentences, and a decision by the Judge Advocate General to deny petitions for new trials. Id. at 144, 73 S. Ct. at 1049. The Court deemed it clear, under those circumstances, that the military courts had given full and fair consideration to each claim. Id.

Although there has been inconsistency among the circuits on the proper amount of deference due the military courts and the interpretation and weight to be given the "full and fair consideration" standard of Burns, this circuit has consistently granted broad deference to the military in civilian collateral review of court-martial convictions. See, e.g., Kehrli v. Sprinkle, 524 F.2d 328, 331 (10th Cir. 1975), cert. denied, 426 U.S. 947, 96 S. Ct. 3165, 49 L.Ed.2d 1183 (1976); King v. Moseley, 430 F.2d 732, 735 (10th Cir. 1970); Kennedy v. Commandant, 377 F.2d 339, 342 (10th Cir. 1967). Although we have applied the "full and fair consideration" standard, we have never attempted to define it precisely. Rather, we have often recited the standard and then considered or refused to consider the merits of a given claim, with minimal discussion of what the military courts actually did.

We will entertain military prisoners' claims if they were raised in the military courts and those courts refused to consider them. See Burns, 346 U.S. at 142, 73 S. Ct. at 1048; Dickenson v. Davis, 245 F.2d 317, 320 (10th Cir. 1957), cert. denied, 355 U.S. 918, 78 S. Ct. 349, 2 L.Ed.2d 278 (1958). We will not review petitioners' claims on the merits if they were not raised at all in the military courts, see, e.g., McKinney v. Warden, 273 F.2d 643, 644 (10th Cir. 1959), cert. denied, 363 U.S. 816, 80 S. Ct. 1253, 4 L.Ed.2d 1156 (1960); Suttles v. Davis, 215 F.2d 760, 763 (10th Cir. 1954). When an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion. See King, 430 F.2d at 735.

> There is no indication in any of our decisions that the military must provide an evidentiary hearing on an issue to avoid further review in the federal courts. On the contrary, less than an evidentiary hearing has amounted to "full and fair consideration." We decline to adopt a rigid rule requiring evidentiary hearings for ineffective assistance of counsel claims.
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> We hold that the military did give full and fair consideration to the ineffective assistance of counsel claim at issue in this case. Although the military courts did not afford Watson an evidentiary hearing on his claim, he did receive a hearing on his ineffective assistance claim in his appeal to the Army Court of Military Review. That court's opinion expressly considered the explanations of Watson's trial counsel in a post-trial affidavit and demonstrated that the military court examined the trial record of the court-martial. In Burns the Supreme Court relied in part on its belief that the military courts had scrutinized the trial record before rejecting the petitioners' claims. Burns, 346 U.S. at 144, 73 S. Ct. at 1049.
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> Under the circumstances of this case, it was unnecessary for the district court to issue an order to show cause or to hold an evidentiary hearing. It appeared from the application, even without the trial record, that Watson was not entitled to relief. See 28 U.S.C. ' 2243. We therefore AFFIRM the district court's dismissal of the application for a writ of habeas corpus.

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(3) In Lips v. Commandant, U.S. Disciplinary Barracks,[52] the United States Court of Appeals for the Tenth Circuit reaffirmed its commitment to the Burns v. Wilson "full and fair" consideration test:

> The starting point in our discussion is Burns v. Wilson, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953). That case stands for the proposition that federal courts have jurisdiction over applications for habeas corpus by persons incarcerated by the military courts, though "in military habeas corpus the inquiry, the scope of matters open to review, has always been more narrow than in civil cases." Id. at 139, 73 S. Ct. at 1047.

[52]997 F.2d 808, 810-11 (10th Cir. 1993), cert. denied, 114 S. Ct. 920 (1994).

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Under Burns, if the military gave full and fair consideration to claims asserted in a federal habeas corpus petition, the petition should be denied.

Citing its prior holding in Dodson v. Zelez,[53] the court further stated that:

> . . . review by a federal district court of a military conviction is appropriate only if the following four conditions are met: (1) the asserted error is of substantial constitutional dimension; (2) the issue is one of law rather than of disputed fact already determined by the military tribunal; (3) there are no military considerations that warrant different treatment of constitutional claims; and (4) the military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards.[54]

(4) Most federal courts no longer follow Burns v. Wilson. The prevailing scope of collateral review, which affords military convictions no more deference than civilian ones, is reflected in the following case:

KAUFFMAN v. SECRETARY OF THE AIR FORCE
415 F.2d 991 (D.C. Cir. 1969),
cert. denied, 396 U.S. 1013 (1970)

Before EDGERTON, Senior Circuit Judge, and TAMM and ROBINSON, Circuit

EDGERTON, Senior Circuit Judge:

Appellant brought suit in the District Court to have his court-martial conviction and sentence declared void on the ground that they rested upon violations of his constitutional rights. He also asked for restoration to active duty with full rank, and the seniority and allowances to which he would have been entitled had he not been discharged, resting his claim on the record made in the court-martial proceeding.

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[53]917 F.2d 1250 (10th Cir. 1990).

[54]Lips, 997 F.2d at 811.

The case was decided upon cross-motions for summary judgment and the government's alternative motion to dismiss for want of jurisdiction in the District Court. The District Court held that it had jurisdiction to entertain an action for declaratory relief attacking a court-martial conviction, but granted summary judgment for the government on the ground that the issues raised by appellant were fully and fairly considered in the military proceedings.

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I

FACTS AND MILITARY PROCEEDINGS

Appellant was charged with violations of the Uniform Code of Military Justice, 10 U.S.C. §801 et seq., growing out of certain contacts between appellant and East German officials. In September 1960, appellant was a captain in the United States Air Force, authorized to travel in Europe for thirty days before reporting to his next duty station at Castle Air Force Base, California. While traveling by train from Hamburg to West Berlin, through East Germany, he was removed from the train, detained, and questioned by East German authorities. He was released to go to West Berlin, "giving his word" that he would return to East Berlin. He returned on October 1, 2, and 3 for social entertainment and further questioning sessions with the East Germans.

Appellant was asked to sign an agreement to provide information to the East German Political Secret Service. He refused. The East Germans wrote the name and address of Klara Weiss, a resident of West Berlin, in his pocket notebook as a cover address for any further communications. He left West Berlin for California on October 4, 1960.

In June of 1961, a defector from East Germany named Gunter Maennel reported to American authorities that he had participated in the interrogation of appellant. An investigation was initiated by the Air Force Office of Special Investigations (OSI), resorting to means which the Court of Military Appeals described as "massive and deliberate violations of appellant's constitutional rights." Appellant was sent to another Air Force Base on temporary duty to enable three OSI agents to break into his off-base residence on four occasions to search the premises. These agents swore that nothing in the way of evidence was found in these four searches. Another OSI agent obtained a warrant for a fifth search of appellant's residence, claiming that the affidavit was

based solely upon evidence obtained in Europe. The fifth search was apparently more efficient, for the agent seized the notebook containing Klara Weiss' name and address, located in appellant's top dresser drawer, and photographed other documents establishing his presence in Germany at the time of the alleged interrogations by the East Germans.

In addition, while appellant was in custody and confined to the base hospital, OSI agents monitored his hospital room and eavesdropped on his conversations, including those with his attorney. This interference with his right to counsel was condemned in a resolution adopted by the Board of Governors of the State Bar of California.

Appellant was then transferred, over his objection, to Weisbaden Air Base, Germany, for pre-trial investigation and trial. He claimed that this transfer was prejudicial because of tension in the area due to the erection of the Berlin Wall, and because counsel of his choice was unable to leave his practice for the period required for the proceedings in Germany. He was, however, represented by distinguished counsel who had served as a judge on the Court of Military Appeals and as a member of the Supreme Court of Utah.

Four charges were lodged against appellant alleging violation of various articles of the Uniform Code of Military Justice. These charges were:

> Charge I: Violation of Article 81, 10 U.S.C. §881; conspiracy. Specification: Conspiracy with persons known to be members of the East German Secret Service to communicate information relating to the national defense of the United States.
>
> Charge II: Violation of Article 92, 10 U.S.C. §892; failure to obey order or regulation. Specification 1: Travel through East Germany without proper orders. (Attachment 5, Air Force Manual 35-22). Specification 2: Failure to report attempts by persons known to be representatives of the Soviet Union and East Germany to secure information contrary to the security and best interests of the United States and to cultivate him socially. (Paragraph 1, Air Force Regulation 205-57, dated 2 July 1959.)
>
> Charge III: Violation of Article 133, 10 U.S.C. § 933; conduct unbecoming an officer. Specification: Agreement to return to East Germany in 1963 for

training by the Secret Service and to obtain and communicate certain information.

Charge IV: Violation of Article 134, 10 U.S.C. § 934; conduct tending to discredit the armed forces. Specification: Communication to Gunter Maennel of information relating to the defense of the United States.

The court martial took place on April 10-18, 1962. Appellant was convicted as charged, except for Specification 1 of Charge II regarding travel orders, which was dismissed before trial. He was sentenced to dismissal from the Service, forfeiture of all pay and allowances and confinement at hard labor for 20 years.

The record was reviewed and approved by the convening authority and forwarded to the Judge Advocate General of the Air Force for review by a Board of Review. The Board set aside the finding of guilt as to Charge IV, communication of information to Maennel, as based on hearsay, and reduced appellant's term of confinement to a maximum of 10 years.

On appeal the Court of Military Appeals reversed the convictions on the remaining substantive espionage Charges I and III on the ground that the charges were founded on hearsay and that no overt act of conspiracy had been shown. United States v. Kauffman, 14 U.S.C.M.A. 283, 34 C.M.R. 63 (1963). Conviction on Charge II, failure to report contacts with agents of unfriendly powers, was affirmed upon a finding that it was not affected by the constitutional and nonconstitutional errors alleged. The case was referred back to the Judge Advocate General with instructions that a rehearing on sentence could be ordered before the original Board of Review or another Board of Review could be convened to reassess the sentence.

The original Board held a hearing on the matter of resentencing, and reduced the term of confinement at hard labor to two years. Appellant's petition for review of this action was denied by the Court of Military Appeals. On June 28, 1964, the reassessed sentence was approved by the Secretary of the Air Force, except that an administrative discharge under other than honorable conditions was substituted for the dismissal from service. By that time, appellant had served his two years of confinement. Total forfeiture of pay and allowances remained in effect.

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SCOPE OF REVIEW

The government contends that even if civilian courts have jurisdiction to entertain collateral attacks on military judgments not presented upon petition for habeas corpus, the scope of review is narrower than the scope of collateral review of state and federal convictions. First, it contends that in collateral review of military judgments courts may inquire into only the traditional elements of jurisdiction--whether the court martial was properly constituted, and had jurisdiction of the person and the offense and the power to impose the sentence--and not the constitutional errors held to oust courts of jurisdiction since Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938). Second, the government asserts that even if collateral review extends to constitutional errors, the duty of the civilian court is done if it finds that the military court has considered the serviceman's constitutional claims, even if its conclusions are erroneous by prevailing Supreme Court standards. We find no support for the first proposition, and no persuasive authority for the second.

In Burns v. Wilson, 346 U.S. 137, 73 S. Ct. 1945, 97 L.Ed. 1508, rehearing denied, 346 U.S. 844, 74 S. Ct. 3, 98 L.Ed. 363 (1953), the leading case on the scope of review, only one Justice was willing to affirm dismissal of a serviceman's petition for habeas corpus upon the narrow jurisdictional test. Upon the denial of rehearing in Burns, Justice Frankfurter wrote an opinion asking that the decision be clarified, and expressing doubt "that a conviction by a constitutional court which lacked due process is open to attack by habeas corpus while an identically defective conviction when rendered by an ad hoc military tribunal is invulnerable." 346 U.S. at 851, 74 S. Ct. at 7. We see no argument for such a distinction. Deference to the peculiar needs of the military does not require denying servicemen the contemporary reach of the writ.

The argument that military judgments are subject to less exacting scrutiny on collateral review than state or federal judgments relies upon the statement of a plurality of the Court in Burns v. Wilson, supra, that "when a military decision has dealt fully and fairly with an allegation raised in that application [for a writ of habeas corpus], it is not open to a federal civil court to grant the writ simply to reevaluate the evidence." 346 U.S. at 142, 73 S. Ct. at 1049. (Emphasis supplied.) The Supreme Court has never clarified the standard of full and fair consideration, and it has meant many things to many courts. One commentator has observed that in following Burns, "a court may simply

and summarily dismiss a petition upon the ground that the military did not refuse to consider its allegations or it may, with equal ease or upon the same authority, stress the requirement that military consideration shall have been full and fair." Bishop, Civilian Judges and Military Justice, 61 Col.L.Rev. 40, 47 (1961).

We think it is the better view that the principal opinion in Burns did not apply a standard of review different from that currently imposed in habeas corpus review of state convictions. The Court's denial of relief on the merits of the serviceman's claims can be explained as a decision based upon deference to military findings of fact, similar to the general non-reviewability of state factual findings prevailing at the time. But cf. Townsend v. Sain, 372 U.S. 293, 311, 83 S. Ct. 745, 9 L.Ed.2d 770 (1962). Note, Servicemen in Civilian Courts, 76 Yale L.J. 380, 392-395 (1966). Courts taking this view have interpreted Burns to require review of military rulings on constitutional issues for fairness. See, e.g., Application of Stapley, 246 F. Supp. 316 (D.Utah 1965); Gibbs v. Blackwell, 354 F.2d 469 (5th Cir. 1965).

The District Court below concluded that since the Court of Military Appeals gave thorough consideration to appellant's constitutional claims, its consideration was full and fair. It did not review the constitutional rulings of the Court of Military Appeals and find them correct by prevailing Supreme Court standards. This was error. We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule. The military establishment is not a foreign jurisdiction; it is a specialized one. The wholesale exclusion of constitutional errors from civilian review and the perfunctory review of servicemen's remaining claims urged by the government are limitations with no rational relation to the military circumstances which may qualify constitutional requirements. The benefits of collateral review of military judgments are lost if civilian courts apply a vague and watered-down standard of full and fair consideration that fails, on the one hand, to protect the rights of servicemen, and, on the other, to articulate and defend the needs of the services as they affect those rights.

[The court resolved the merits of the plaintiff's claim in the Government's favor, and affirmed the judgment of the district court.][55]

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[55]See Schlomann v. Ralston, 691 F.2d 401 (8th Cir. 1982), cert. denied, 459 U.S. 1221 (1983); Hatheway v. Sec'y of Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981); Curry v. Sec'y of Army, 595 F.2d 873 (D.C. Cir. 1979); Curci v.

footnote continued next page

(5) Some courts will apply the Burns test to factual but not legal issues. That is, the courts will not review factual questions "fully and fairly" considered by military courts, but will review legal determinations de novo. The United States Court of Appeals for the Federal Circuit adopts the following approach:

BOWLING v. UNITED STATES
713 F.2d 1558 (Fed. Cir. 1983)

Before BENNETT, SMITH and NIES, Circuit Judges.

BENNETT, Circuit Judge.

Appellant Bowling challenges the decision of the United States Claims Court which, in an opinion and order on November 19, 1982 (amended December 3, 1982), granted defendant's cross-motion for summary judgment and dismissed the plaintiff's petition. Bowling v. United States, 1 Cl.Ct. 15, 552 F. Supp. 54 (1982). We affirm.

Appellant, a former Army enlisted man, was tried by a military judge sitting as a Special Court-Martial in Mannheim, Germany, on September 4, 1974, for unlawful possession and transfer of marijuana in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §934 (1976). Appellant was found guilty of both offenses charged, and on September 17, 1974, was sentenced to be reduced to the grade of Private (E-1), to forfeit $217 of pay per month for five months, to be confined at hard labor for five months, and to be discharged from the Army with a bad-conduct discharge. A portion of the confinement was later remitted but the rest of the sentence was executed.

The Brigade Staff Judge Advocate reviewed the trial record and recommended that the findings and sentence be upheld. The Commanding General, pursuant to Articles 60 and 64, UCMJ, 10

(..continued)
United States, 577 F.2d 815 (2d Cir. 1978); Baker v. Schlesinger, 523 F.2d 1031 (6th Cir. 1975), cert. denied, 424 U.S. 972 (1976); Allen v. Van Cantfort, 436 F.2d 625 (1st Cir.), cert. denied, 402 U.S. 1008 (1971).

U.S.C. §§860, 864, then reviewed the record. He approved the findings and sentence on November 14, 1974.

A third review of the trial record was made by the Army Court of Military Review pursuant to Article 65(b), UCMJ, 10 U.S.C. §865(b). Again, the findings and sentence were affirmed. Appellant petitioned the United States Court of Military Appeals, which on October 11, 1979, returned the case to the Judge Advocate General of the Army for remand to the Army Court of Military Review to reconsider the sufficiency of the evidence of possession of the marijuana. Upon reconsideration, the Court of Military Review found that appellant's guilt was proven beyond a reasonable doubt and again affirmed the findings and sentence. The Court of Military Appeals denied a second petition for review on February 9, 1981. This sixth consideration of appellant's case since his conviction in 1974 exhausted his opportunities for relief by the military justice system. But, this was not the end of Bowling's appeals.

Appellant's petition for a writ of habeas corpus in the United States District Court for the District of Columbia was denied on September 28, 1981, for his failure to establish the requisite custody within the meaning of 28 U.S.C. §2241(c)(3).

Next, appellant sued in the United States Court of Claims on November 23, 1981, seeking to have his conviction and sentence vacated, and requesting that he be reinstated in the Army with back pay at his previous grade and be retroactively promoted. Both sides filed for summary judgment. The United States Claims Court assumed the trial jurisdiction of the Court of Claims on October 1, 1982, pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. Accordingly, in the ninth review of appellant's case we are called upon to decide whether the Claims Court decision granting defendant's (appellee's) cross-motion for summary judgment and dismissal of the petition should be upheld.

It is apparent from the foregoing that appellant's case has not lacked for review. All of his arguments raised now have been considered before, and rejected. Presently, however, appellant puts great emphasis on his allegations that he has been deprived of constitutional rights by errors of the Claims Court. Before we turn to the six alleged errors, we must outline our scope of review in this matter and decide whether the standards of review utilized by the trial court were correct as a matter of law.

In a careful and exhaustive opinion, Judge White of the Claims Court reviewed the applicable law and correctly held that judgments by courts-martial, although not subject to direct review by federal civil

courts, may nevertheless be subject to narrow collateral attack in such courts on constitutional grounds if the action is otherwise within a court's jurisdiction, as it is here for back pay and reinstatement. This is true notwithstanding the fact that Article 76 of the UCMJ, 10 U.S.C. §876, expressly states that all dismissals and discharges under sentences by courts-martial following approval, review, or affirmation are final and conclusive. Schlesinger v. Councilman, 420 U.S. 738, 95 S. Ct. 1300, 43 L.Ed.2d 591 (1975). However, the constitutional claims made must be serious ones to support an exception to the rule of finality. They must demonstrate convincingly that in the court-martial proceedings there has been such a deprivation of fundamental fairness as to impair due process. As stated by the Supreme Court in United States v. Augenblick, 393 U.S. 348, 356, 89 S. Ct. 528, 534 21 L.Ed.2d 537 (1969)--

> apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal . . . than a disciplined contest. [Citations omitted.]

In another case, the Supreme Court spoke again on the importance of fundamental fairness in military justice proceedings, for the constitutional guarantee of due process is applicable both to civilians and soldiers. It said that soldiers must be protected--

> from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts. [Burns v. Wilson, 346 U.S. 137, 142-43, 73 S. Ct. 1045, 1049, 97 L.Ed. 1508 (1953).]

But, in that same case, the Court narrowly defined the civil court's scope of review, saying:

> These records make it plain that the military courts have heard petitioners out on every significant allegation which they now urge. Accordingly, it is not

> the duty of the civil courts simply to repeat that process--to reexamine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims. [Id. at 144, 73 S. Ct. at 1050.]

By the foregoing tests, the Claims Court conscientiously went as far, or further, than necessary in consideration of the appellant's claims. Our own precedents hold that questions of fact resolved by military courts cannot be collaterally attacked. See, e.g., Flute v. United States, 535 F.2d 624, 626 (Ct. Cl. 1976). This court will not reweigh the evidence presented at plaintiff's court-martial in order that it might substitute its judgment for that of the military trial court. Artis v. United States, 506 F.2d 1387, 1391 (Ct. Cl. 1974); Taylor v. United States, 199 Ct. Cl. 171 (1972).

The petition presented to the Claims Court relies on the same alleged errors complained of in an Assignment of Errors which was filed with the United States Court of Military Appeals in the court-martial proceedings. The Claims Court discussed each of these alleged errors in detail in its published opinion so we do not find it necessary to do so here. Now appellant says that the Claims Court made the same errors he alleges that the Court of Military Appeals made.

The first error attributed to the Claims Court is in refusing to hold that the military judge erred at the court-martial by not granting a motion to suppress because the officer authorizing the search was incapable of acting in an impartial capacity. This raises a fourth amendment claim against illegal searches and seizures. It is a well-established rule in both the civil and military courts that a search can be authorized only by an impartial magistrate and not by an officer engaged in ferreting out crime. A determination as to whether the person who authorized the search was impartial was held by the Claims Court to be largely a question of factual inquiry which the military trial and appellate courts all resolved against plaintiff after his counsel had been afforded every reasonable opportunity to establish partiality. Nothing new is given which should dictate a different result now.

The second error alleged is that the Claims Court refused to hold that the military judge made a mistake in denying a motion to suppress because there was an insufficient showing of probable cause for the authorization of a search. This too is a fourth amendment issue.

Determination of the existence of probable cause requires a factual inquiry to find if under the circumstances a prudent man would conclude that an offense had been or was being committed. Lack of probable cause was raised and argued in the proceedings all the way up to and including the Court of Military Appeals and the contention was rejected. As this contention received "fair consideration," Burns v. Wilson, 346 U.S. at 144, 73 S. Ct. at 1050, in the military justice system, the adverse fact-finding there is conclusive now.

The third claim of error against the Claims Court is in its refusal to hold that the military judge erred in denying the motion to suppress as the search and seizure were unlawful because of an improper authorization to search. Alternatively, it is argued that, even if authority was properly delegated, it did not meet fourth amendment requirements of reasonableness. Authorization for the search in question was pursuant to a delegation of authority from the commanding officer. The latter term is defined by Army Regulations, AR 190-22, para. 2-1(a) (June 12, 1970), and AR 600-20, para. 3-2(a) (June 22, 1973). The Claims Court opinion discussed the applicability of these regulations to the facts and concluded that plaintiff's contention, which was rejected by the military courts, was given "fair consideration," and was not unreasonable, and no fundamental error was made. We agree.

The fourth alleged error is that the evidence was insufficient to support a finding of guilty beyond a reasonable doubt. Appellant attacks the credibility of an informant and principal witness against him at the court-martial trial. He also points to the fact that the illegal drug was found in a room occupied jointly with another soldier. The latter was the issue which brought a remand by the Court of Military Appeals for reconsideration of the evidence about possession by the Court of Military Review. The result was an affirmance of the finding of plaintiff's possession of the contraband beyond a reasonable doubt. As to the credibility of the challenged witness, credibility is for the trier of fact who has had an opportunity to see and to hear the witness under oath and cross-examination. As noted heretofore, it is not the responsibility of a civil court to reweigh the factual evidence and in any event those factual determinations made by a court-martial are not of constitutional significance, absent a showing that the trial was not a fair and disciplined contest. United States v. Augenblick, 393 U.S. at 356, 89 S. Ct. at 533-34; Levy v. Parker, 478 F.2d 772, 797 (3d Cir. 1973), aff'd, 417 U.S. 733, 94 S. Ct. 2547, 41 L.Ed.2d 439 (1974) [sic]. This allegation of error also must be rejected.

The fifth error assigned is an alleged fatal variance in the specifications and the evidence. Appellant was charged with and

convicted of possessing and transferring marijuana. The evidence at trial related to hashish, its possession and transfer to another soldier. A chemist testified that the contraband was marijuana in hashish form, both substances being derived from the hemp plant. The term marijuana was held sufficiently general in scope to include hashish. Hamid v. Immigration & Naturalization Service, 538 F.2d 1389 (9th Cir. 1976). We agree that the evidence supports this definition. See also Webster's Third New International Dictionary (Unabridged 1965). Appellant was fully informed of the charges against him so that he was able to present his defense. He was not prejudiced by any error here and even if we assume that there was error it was harmless because the distinction advanced is nominal. Appellant is also fully protected against another prosecution for the same offense.

The sixth and final assignment of error is that the punishment imposed was harsh and inequitable and should be ordered substantially reduced. However, the punishment imposed was less than that authorized by military law for the offenses of which appellant was convicted. Assessment of the penalty is entrusted by law to the discretion of the military authorities. We cannot say that the discretion exercised was abused, unlawful, or reaches constitutional dimensions. Accordingly, we are without jurisdiction to substitute our own discretion for that of the trier of fact who imposed a lawful sentence.

Our conclusion, nine years after appellant's conviction and after eight other intervening reviews of the trial record in the military and civil judicial systems, is that the Claims Court judgment is correct as a matter of law and that the appeal is without merit. Accordingly, the judgment of the Claims Court is affirmed.

AFFIRMED.[56]

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(6) The Fifth Circuit, in Calley v. Callaway, has attempted to synthesize into a uniform analysis the divergent approaches taken by the federal courts in collateral review of courts-martial.

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[56]See Sisson v. United States, 814 F.2d 634 (Fed. Cir. 1987); Levy v. Parker, 478 F.2d 772 (3d Cir. 1973), rev'd on other grounds, 417 U.S. 733 (1974). Compare McDonald v. United States, 531 F.2d 490 (Ct. Cl. 1976) (purely legal issues).

CALLEY v. CALLAWAY

519 F.2d 184 (5th Cir. 1975),
cert. denied, 425 U.S. 911 (1976)

AINSWORTH, Circuit Judge:

In this habeas corpus proceeding we review the conviction by military court-martial of Lieutenant William L. Calley, Jr., the principal accused in the My Lai incident in South Vietnam, where a large number of defenseless old men, women and children were systematically shot and killed by Calley and other American soldiers in what must be regarded as one of the most tragic chapters in the history of this nation's armed forces.

Petitioner Calley was charged on September 5, 1969, under the Uniform Code of Military Justice, 10 U.S.C. §801 et seq., with the premeditated murder on March 16, 1968 of not less than 102 Vietnamese civilians at My Lai (4) hamlet, Song My village, Quang Ngai province, Republic of South Vietnam. The trial by general court-martial began on November 12, 1970, at Fort Benning, Georgia, and the court members received the case on March 16, 1971. (The function of court members in a military court-martial is substantially equivalent to that of jurors in a civil court.) On March 29, 1971, the court-martial, whose members consisted of six Army officers, found Calley guilty of the premeditated murder of not fewer than 22 Vietnamese civilians of undetermined age and sex, and of assault with intent to murder one Vietnamese child. Two days later, on March 31, 1971, the court members sentenced Calley to dismissal from the service, forfeiture of all pay and allowances, and to confinement at hard labor for life. On August 20, 1971, the convening authority, the Commanding General of Fort Benning, Georgia, approved the findings and sentence except as to the confinement period which was reduced to twenty years. See Article 64 of the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 864. The Army Court of Military Review then affirmed the conviction and sentence. United States v. Calley, 46 C.M.R. 1131 (1973). The United States Court of Military Appeals granted a petition for review as to certain of the assignments of error, and then affirmed the decision of the Court of Military Review. United States v. Calley, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973); see Art. 67(b)(3), U.C.M.J., 10 U.S.C. §867(b)(3). The Secretary of the

Army reviewed the sentence as required by Art. 71(b), U.C.M.J., 10 U.S.C. §871(b), approved the findings and sentence, but in a separate clemency action commuted the confinement portion of the sentence to ten years. On May 3, 1974, President Richard Nixon notified the Secretary of the Army that he had reviewed the case and determined that he would take no further action in the matter.

> On February 11, 1974, Calley filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia against the Secretary of the Army and the Commanding General, Fort Benning, Georgia. At that time, the district court enjoined respondents from changing the place of Calley's custody or increasing the conditions of his confinement. On February 27, 1974, the district court ordered that Calley be released on bail pending his habeas corpus application. On June 13, 1974, this Court reversed the district court's orders, returning Calley to the Army's custody. Calley v. Callaway, 5 Cir. 1974, 496 F.2d 701. On September 25, 1974, District Judge Elliott granted Calley's petition for a writ of habeas corpus and ordered his immediate release. The Army appealed and Calley cross-appealed. At the Army's request a temporary stay of the district judge's order of immediate release was granted by a single judge of this Court. See Rule 27(c), Fed.R.App.P. This Court subsequently met en banc, upheld the release of Calley pending appeal, and ordered en banc consideration of the case. We reverse the district court's order granting a writ of habeas corpus and reinstate the judgment of the court-martial.[5]
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> . . . .

[5]The Army has granted Calley's application for parole and he has been released from confinement. This fact, however, does not deprive the federal courts of habeas corpus jurisdiction, for a person on parole is "in custody" for purposes of habeas corpus jurisdiction. Jones v. Cunningham, 371 U.S. 236, 83 S. Ct. 373, 9 L.Ed.2d 285 (1963). See also 28 U.S.C. §2253, which grants this court jurisdiction to review on appeal the final order in a habeas corpus proceeding before a district judge.

II. Scope of Review of Court-Martial Convictions

We must first consider the extent to which a federal court is empowered to review court-martial convictions on petitions for habeas corpus. The Government contends that the district court exercised an impermissibly broad scope of review of Calley's claims. Relying on Burns v. Wilson, 346 U.S. 137, 73 S. Ct. 1045, 97 L.Ed. 1508 (1953), the Government argues that review by the federal courts is complete after a determination that the military courts have fully and fairly considered Calley's claims, and that, since that has been accomplished by the military courts, further review by way of habeas corpus proceedings is not appropriate.

[The court traced the history of collateral review of courts-martial to Burns v. Wilson.]

Burns v. Wilson

The petitioners in Burns had been found guilty of rape and murder and sentenced to death by court-martial. Burns alleged in his habeas petition several deprivations of constitutional rights, contending that the military had coerced his confession, suppressed evidence favorable to him, denied him effective counsel, detained him illegally and created an atmosphere of terror and vengeance not conducive to a fair decision. See 346 U.S. at 138, 73 S. Ct. at 1047. The court of appeals affirmed denial of the writs, but only after a detailed review of the facts and the court-martial transcripts. Burns v. Lovett, 1952, 91 U.S. App. D.C. 208, 202 F.2d 335.

The Supreme Court affirmed the denial of habeas corpus relief, but stated that the circuit court had "erred in reweighing each item of relevant evidence in the trial record. . . ." 346 U.S. at 146, 73 S. Ct. at 1051. A plurality of the court (Chief Justice Vinson, Justices Burton, Clark and Reed) agreed that the constitutional guarantee of due process was meaningful enough to protect both soldiers and civilians "from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness. . . ." Id. at 142, 73 S. Ct. at 1049. Nonetheless, in reviewing court-martial convictions to ascertain whether due process rights had been abridged, the Court stated that "in military habeas corpus the inquiry, the scope of matters

open for review, has always been more narrow than in civil cases." Id. at 139, 73 S. Ct. at 1047. The Court stated that "when a military decision has dealt fully and fairly with an allegation raised in that application [for habeas corpus], it is not open to a federal civil court to grant the writ simply to reevaluate the evidence." 346 U.S. at 142, 73 S. Ct. at 1049. Its review of the case showed that "the military courts have heard petitioners out on every significant allegation which they now urge." Id. at 144, 73 S. Ct. at 1050. The Court concluded:

> Accordingly, it is not the duty of the civil courts to repeat that process--to reexamine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the application for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims. (citation omitted) We think they have.

Id. (emphasis added).

Burns thus announced a scope of review in military habeas cases broader than the old jurisdictional test, but narrower than that in state and federal habeas cases. Federal courts have interpreted Burns with considerable disagreement. Soon after the decision in Burns, we noted the "uncertain state of the law" regarding the proper scope of review. Bisson v. Howard, 5 Cir., 1955, 224 F.2d 586, 589-590, cert. denied, 350 U.S. 916, 76 S. Ct. 201, 100 L.Ed. 803. More recently we said that while Burns allowed collateral attack on courts-martial, "the scope of that review was left uncertain." Mindes v. Seaman, 5 Cir., 1971, 453 F.2d 197, 201. We have stated that, since Burns, "the scope of review has been considerably broadened," Betonie v. Sizemore, 5 Cir., 1974, 496 F.2d 1001, 1005; that "[c]ourt-martial convictions alleged to involve errors of constitutional proportion have consistently been held to be subject to court review." Mindes v. Seaman, supra, 453 F.2d at 201. But we have also stated that there is a "very limited field in which the civilian courts can review court-martial proceedings." Bisson v. Howard, supra, 224 F.2d at 587, that "[h]abeas corpus review of convictions by court-martial is limited to questions of jurisdiction (citation omitted), and the limited function of determining whether the military has given fair consideration to petitioners' claims, (citing Burns)." Peavy v. Warner, 5 Cir., 1974, 493

F.2d 748, 749. Other circuits are divided on the proper scope of review.

With this background we summarize our view of the proper scope of review.

Determining the Proper Scope of Review

The cited cases establish the power of federal courts to review court-martial convictions to determine whether the military acted within its proper jurisdictional sphere. We are more concerned here, however, with the extent to which federal courts may review the validity of claims that errors in the military trial deprived the accused of due process of law, when the military courts have previously considered and rejected the same contentions. We conclude from an extensive research of the case law that the power of federal courts to review military convictions of a habeas petition depends on the nature of the issues raised, and in this determination, four principal inquiries are necessary.

1. The asserted error must be of substantial constitutional dimension. The first inquiry is whether the claim of error is one of constitutional significance, or so fundamental as to have resulted in a miscarriage of justice. Most courts which have interpreted Burns to allow review of nonjurisdictional claims have given cognizance only to assertions that fundamental constitutional rights were violated. The premise that we cannot review a military conviction without substantial claim of denial of fundamental fairness or of a specific constitutional right is strengthened by the holding in United States v. Augenblick, 393 U.S. 348, 89 S. Ct. 528, 21 L.Ed.2d 537 (1969), in which the Supreme Court held that the Court of Claims erred in considering petitioners' assertions where only an error of law (an asserted violation of the Jencks Act, 18 U.S.C. §3500), rather than a constitutional defect or due process violation, was present. See 393 U.S. at 351-352, 352-353, 356, 89 S. Ct. at 531, 532, 533-534. As the Supreme Court has commented, "The writ of habeas corpus has limited scope; the federal courts do not sit to re-try . . . cases de novo but, rather, to review for violation of federal constitutional standards." Milton v. Wainwright, 407 U.S. 371, 377, 92 S. Ct. 2174, 2178, 33 L.Ed.2d 1 (1972). See also Cupp v. Naughton, 414 U.S. 141, 94 S. Ct. 396, 38 L.Ed.2d 368 (1973); Donnelly v. DeChristoforo, 416 U.S. 637, 642-643, 94 S. Ct. 1868, 1871, 40 L.Ed.2d 431 (1974); Ross v. Wainwright, 5 Cir., 1971, 451 F.2d 298, 301, cert. denied, 409 U.S. 884, 93 S. Ct. 98,

34 L.Ed.2d 141 (1972); Young v. Alabama, 5 Cir., 1971, 443 F.2d 854, 855, cert. denied, 405 U.S. 976, 92 S. Ct. 1202, 31 L.Ed. 166 (1941).

Most habeas corpus cases have provided relief only where it has been established that errors of constitutional dimension have occurred. But the Supreme Court held in a recent decision that nonconstitutional errors of law can be raised in habeas corpus proceedings where "the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,'" and when the alleged error of law '"present[ed] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" Davis v. United States, 417 U.S. 333, 346, 94 S. Ct. 2298, 2305, 41 L.Ed.2d 109 (1974), quoting Hill v. United States, 368 U.S. 424, 428, 82 S. Ct. 468, 471, 7 L.Ed.2d 417 (1962). Thus, an essential prerequisite of any court-martial error we are asked to review is that it present a substantial claim of constitutional dimension or that the error be so fundamental as to have resulted in a gross miscarriage of justice.

2. The issue must be one of law rather than of disputed fact already determined by the military tribunals. The second inquiry is whether the issue raised is basically a legal question, or whether resolution of the issue hinges on disputed issues of fact. This circuit said in Gibbs v. Blackwell, 5 Cir., 1965, 354 F.2d 469, 471, that "In reviewing military convictions, the courts must be on guard that they do not fail to perceive the difference between reviewing questions of fact and law. This is especially true at the constitutional level." Compare Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L.Ed.2d 439 (1974), where the review of matters resolved against a serviceman "on a factual basis by the court-martial which convicted him" was held to be beyond the proper scope of review. Id. at 760-761, 94 S. Ct. at 2564. The Court of Claims has noted that abstinence from reviewing court-martial proceedings need not necessarily be practiced "where the serviceman presents pure issues of constitutional law, unentangled with an appraisal of a special set of facts." Shaw v. United States, 1966, 357 F.2d 949, 953-954, 174 Ct. Cl. 899. See Burns v. Wilson, supra, 346 U.S. at 142, 145, 146, 73 S. Ct. at 1049, 1050, 1051. Thus, a conclusion that a military prisoner's claim is one of the law and not intertwined with disputed facts previously determined by the military is one important factor which favors broader review.

3. Military considerations may warrant different treatment of constitutional claims. The third inquiry is whether factors peculiar to the military or important military considerations require a different constitutional standard. Where a serviceman's assertion of constitutional rights has been determined by military tribunals, and they have concluded that the serviceman's position, if accepted, would have a foreseeable adverse affect on the military mission, federal courts should not substitute their judgment for that of the military courts. In this regard the Supreme Court stated in Burns that the law of civilian habeas corpus could not be assimilated to the law governing military habeas corpus because military law is sui generis. 346 U.S. at 139-140, 73 S. Ct. at 1047. This point was reemphasized in Schlesinger v. Councilman, 420 U.S. 738, 95 S. Ct. 1300, 43 L.Ed.2d 591 (1975):

> This Court repeatedly has recognized that, of necessity, "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." Burns v. Wilson, 346 U.S. 137, 140, 73 S. Ct. 1045, 1047, 97 L.Ed. 1508 (1953); Parker v. Levy, 417 U.S. 733, 744, 94 S. Ct. 2547, 2556, 41 L.Ed.2d 439 (1974).

Id. at 746, 95 S. Ct. at 1307. See also Parker v. Levy, 417 U.S. 733, 758, 94 S. Ct. 2546, 2563, 41 L.Ed.2d 439 (1974), where the Court noted that "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." The Supreme Court in Burns emphasized that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." 346 U.S. at 140, 73 S. Ct. at 1048. Cf. Mindes v. Seaman, supra, where this circuit noted that one factor determining whether a federal court should review internal military affairs is the type and degree of anticipated interference with the military function and the extent to which military expertise and discretion are involved. 453 F.2d at 201-202. The importance of this policy was recently reiterated in Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L.Ed.2d 439 (1974). In that case, the Court reviewed the traditional deference allowed for rules and regulations within military society. See 417 U.S. at 743-744, 749-752, 756-759, 94 S. Ct. at 2555-2556, 2558-2560, 2562-2564. The armed forces' requirements of obedience

and discipline, the Court stated, justified a less stringent standard of review for vagueness and overbreadth attacks on Army regulations. Even as to the First Amendment rights asserted by Captain Levy, the Court stated that "the different character of the military community and of the military mission require [sic] a different application of those [First Amendment] protections." Parker v. Levy, 417 U.S. at 758, 94 S. Ct. at 2563. See also Schlesinger v. Councilman, supra.

There are other reasons why federal courts should not intervene in basically military matters. Congress, with its power to create and maintain the armed forces and to declare war, and the President, with his power as Commander-in-Chief, have great powers and responsibilities in military affairs. Congress has a substantial role to play in defining the right of military personnel, see Burns, supra, 346 U.S. at 140, 73 S. Ct. at 1048, and by enactment of the Uniform Code of Military Justice and the Military Justice Act of 1968 it has assumed that responsibility. See also Schlesinger v. Councilman, supra; Hammond v. Lenfest, 2 Cir., 1968, 398 F.2d 705, 710. A related reason is that an independent appellate court, the Court of Military Appeals composed of nonmilitary judges, has been established to review military convictions. That court has reaffirmed that fundamental premise that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." United States v. Jacoby, 11 U.S.C.M.A. 428, 430-431, 29 C.M.R. 244 (1960); see also United States v. Tempia, 16 U.S.C.M.A. 629, 633, 37 C.M.R. 249 (1967); United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); Bishop, supra, 61 Colum L. Rev. at 56, 65-66. The Court of Military Appeals has, in many instances, extended the constitutional rights of servicemen beyond those accorded to civilians. Safeguarding the serviceman's rights is frequently best left to a body with special knowledge of the military system. Schlesinger v. Councilman, supra, 420 U.S. at 757, 95 S. Ct. at 1313, 1314.

4. The military courts must give adequate consideration to the issues involved and apply proper legal standards. The fourth and final inquiry is whether the military courts have given adequate consideration to the issue raised in the habeas corpus proceeding, applying the proper legal standard to the issue. Decisions by reviewing courts within the military justice system must be given a healthy respect, particularly where the issue involved a determination of disputed issues of fact. But a necessary prerequisite is that the military courts apply a proper legal standard to disputed factual claims. See S. E. C. v.

Chenery Corp., 318 U.S. 80, 94, 63 S. Ct. 454, 462, 87 L.Ed 626 (1943). Burns requires that particular respect be given military decisions: "In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings--of the fair determinations of the military tribunals after all military remedies have been exhausted." 346 U.S. at 142, 73 S. Ct. at 1048-1049.

To summarize, the scope of review may be stated as follows:

Military court-martial convictions are subject to collateral review by federal civil courts on petitions for writs of habeas corpus where it is asserted that the court-martial acted without jurisdiction, or that substantial constitutional rights have been violated, or that exceptional circumstances have been presented which are so fundamentally defective as to result in a miscarriage of justice. Consideration by the military of such issues will not preclude judicial review for the military must accord to its personnel the protections of basic constitutional rights essential to a fair trial and the guarantee of due process of law. The scope of review for violations of constitutional rights, however, is more narrow than in civil cases. Thus federal courts should differentiate between questions of fact and law and review only questions of law which present substantial constitutional issues. Accordingly, they may not retry the facts or reevaluate the evidence, their function in this regard being limited to determining whether the military has fully and fairly considered contested factual issues. Moreover, military law is a jurisprudence which exists separate and apart from the law governing civilian society so that what is permissible within the military may be constitutionally impermissible outside it. Therefore, when the military courts have determined that factors peculiar to the military require a different application of constitutional standards, federal courts are reluctant to set aside such decisions.

With these principles in mind, we consider the additional issues raised by this appeal.

. . . .

[The court next considered Calley's assertions of prejudicial pretrial publicity, denial of the right to compulsory process, denial of due process, and various other issues.]

VIII. Conclusion

This Court is convinced that Lieutenant Calley received a fair trial from the military court-martial which convicted him for the

premeditated murder of numerous Vietnamese civilians at My Lai. The military courts have fully and fairly considered all of the defenses made by him and have affirmed that he is guilty. We are satisfied after a careful and painstaking review of this case that no violation of Calley's constitutional or fundamental rights has occurred, and that the findings of guilty were returned by impartial members based on the evidence presented at a fairly conducted trial.

There is no valid reason then for the federal courts to interfere with the military judgment, for Calley has been afforded every right under our American system of criminal justice to which he is entitled.

Accordingly, the order of the district court granting a writ of habeas corpus to Calley is

Reversed.

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c. Recent Developments in Civilian Collateral Review. "Commencing in 1975 and continuing to the present, the Supreme Court has announced a series of decisions limiting the availability of federal habeas relief" from civilian criminal

convictions.[57] One of the more notable decisions is Stone v. Powell,[58] in which the Court resurrected the "full and fair consideration" test for fourth amendment claims. The Court held that where a state "has provided an opportunity for full and fair litigation . . . , the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial."[59] The Court reasoned that the"overall educative effect of the exclusionary rule would [not] be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions" since such proceedings often occur years after the original trial and incarceration of the defendant.[60] Conversely, the societal costs of application of the exclusionary rule "still persist with special force."[61]

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[57]Rosen, supra note 34, at 355.

[58]428 U.S. 465 (1976).

[59]Id. at 481-82.

[60]Id. at 493.

[61]Id. at 495. See Cardwell v. Taylor, 461 U.S. 471 (1983); United States ex rel. Shiflet v. Lane, 815 F.2d 457, 463 (7th Cir. 1987); Davis v. Blackburn, 803 F.2d 1371, 1372-73 (5th Cir. 1986); Gilmore v. Marks, 799 F.2d 51, 54-57 (3d Cir. 1986); Knaubert v. Goldsmith, 791 F.2d 722, 725 (9th Cir.), cert. denied, 479 U.S. 867 (1986); United States ex rel. Patton v. Thieret, 791 F.2d 543, 547 (7th Cir.), cert. denied, 479 U.S. 888 (1986); Caldwell v. Cupp, 781 F.2d 714, 715 (9th Cir. 1986); Flittie v. Solem, 751 F.2d 967, 973 (8th cir. 1985); cert. denied, 475 U.S. 1025 (1986); Brofford v. Marshall, 751 F.2d 845, 856 (6th Cir. 1984), cert. denied, 474 U.S. 872 (1985); LeBron v. Vitek, 751 F.2d 311, 312 (8th Cir. 1985); Gregory v. Wyrick, 730 F.2d 542, 543 (8th Cir.), cert. denied, 469 U.S. 855 (1984); Allen v. Dutton, 630 F. Supp. 379, 384-85 (M.D. Tenn. 1984), aff'd, 785 F.2d 307 (6th Cir. 1986).

The Supreme Court has refused, however, to apply the Stone v. Powell "full and fair" consideration test in sixth amendment claims of ineffective assistance of counsel, even where the alleged ineffectiveness was the consequence of a failure to raise a fourth amendment claim. Kimmelman v. Morrison, 477 U.S. 365 (1986); see Goins

footnote continued next page

In addition to Stone, the Court also has tightened the exhaustion requirement,[62] formulated a stricter doctrine of waiver,[63] and broadened the scope of deference to be afforded state court findings of fact.[64] Thus, the availability of federal civilian habeas corpus has been greatly restricted over the last two decades. As in years past, these developments in civilian habeas jurisprudence should significantly influence the review of military cases.

8.4 The Doctrine of Exhaustion of Military Justice Remedies.

(..continued)
v. Lane, 787 F.2d 248, 252 (7th Cir), cert. denied, 479 U.S. 846 (1986); Cody v. Solem, 755 F.2d 1323, 1328-29 (8th Cir.), cert. denied, 474 U.S. 833 (1985). Nor has the Court extended Stone to claims that the state had failed to prove guilt beyond a reasonable doubt, Jackson v. Virginia, 443 U.S. 307, 320-24 (1979), or to attacks on racial compositions of grand juries, Rose v. Mitchell, 443 U.S. 545, 559-64 (1979). See Adams v. Lankford, 788 F.2d 1493, 1495 (11th Cir. 1986) (refusing to extend Stone to claimed violation of title III of Omnibus Crime Control & Safe Streets Act, 18 U.S.C. §§2516(2), 2518(3)). Stone v. Powell is also inapposite in collateral attacks on federal convictions. See Kaufman v. United States, 394 U.S. 217 (1969). Finally, Stone restrictions on federal habeas jurisdiction in fourth amendment cases do not extend to fifth amendment claims based on alleged Miranda violations. Withrow v. Williams, 507 U.S. 680 (1993).

[62]Anderson v. Harless, 459 U.S. 4 (1982); Rose v. Lundy, 455 U.S. 509 (1982).

[63]Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Coleman v. Thompson, 501 U.S. 722 (1991); Harris v. Reed, 489 U.S. 255 (1989); Murray v. Carrier, 477 U.S. 478 (1986); Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973).

[64]Sumner v. Mata, 455 U.S. 591 (1982).

a. General. The doctrine of exhaustion is one of timing: its application does not preclude federal court review, but merely postpones it until a claimant has pursued available remedies in the military justice system. The doctrine requires that objections to courts-martial be raised in the military trial and any available appellate remedies--including extraordinary proceedings--before collateral relief is sought in the federal courts. This section will review the development of the exhaustion doctrine in collateral proceedings in the federal courts.

b. Exhaustion Before 1950.

(1) Prior to 1950, exhaustion of military remedies was not a prerequisite to collateral review in the civilian courts. If a servicemember challenged the jurisdiction of a court-martial, whether pending or complete, the court would entertain his petition for habeas corpus. If the court determined that the court-martial lacked jurisdiction, the servicemember would be released. Exhaustion was not an issue; if the military court was without jurisdiction, it simply could not proceed.[65] By contrast, in Ex parte Royall,[66] the first case reaching the Supreme Court from a state habeas petitioner, the Court required exhaustion of state remedies.

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[65]See, e.g., Billings v. Truesdell, 321 U.S. 542 (1944) (improper induction); Morrissey v. Perry, 137 U.S. 157 (1890) (minor); United States ex rel. Pasela v. Fenno, 167 F.2d 593 (2d Cir.), cert. denied, 335 U.S. 806 (1948) (reservist); United States ex rel. Harris v. Daniels, 279 F. 844 (2d Cir. 1922) (jurisdiction over offense); Hines v. Mikell, 259 F. 28 (4th Cir. 1919) (civilian); In re Cadwallader, 127 F. 881 (C.C.E.D. Mo. 1904) (statute of limitations).

[66]117 U.S. 241 (1886).

(2) This is not to say federal courts never discussed recourse to military remedies.[67] But the courts did not require a habeas petitioner challenging the jurisdiction of a military tribunal to first present his claim to the very tribunal he asserted had no lawful basis to proceed. In Smith v. Whitney,[68] a case decided the same year as Royall, the Court denied a petition to prohibit a pending court-martial on the ground it was not shown to lack jurisdiction, and not because the servicemember had an obligation to first raise his claim before the military court.

c. Exhaustion After 1950.

(1) In Gusik v. Schilder,[69] the Supreme Court finally extended the doctrine of exhaustion of remedies to collateral review of military convictions. Thomas Gusik, a member of a Guard Company in Italy, was convicted by general court-martial of shooting and killing two civilians near his guard post. He was sentenced to life imprisonment, which was later reduced to 16 years. In a petition for habeas corpus, Gusik claimed that he was denied an impartial and thorough pretrial investigation, that the trial judge advocate failed to call material witnesses in his behalf, and that his counsel was ineffective. The Court refused to review Gusik's claims, holding that he first had to present them to The Judge Advocate General of the Army in an application under Article of War 53. The rationale mandating exhaustion of military remedies was the same as that underlying the exhaustion requirement in state habeas corpus:

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[67] E.g., Wales v. Whitney, 114 U.S. 564 (1885); Ex parte Anderson, 16 Iowa. 595 (1864).

[68] 116 U.S. 167 (1886).

[69] 340 U.S. 128 (1950).

> The policy underlying that rule [of exhaustion] is as pertinent to the collateral attack of military judgments as it is to collateral attack of civilian judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. . . . Such a principal of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.[70]

(2) Despite the doctrine of exhaustion, the Supreme Court granted a number of habeas petitions during the 1950s to civilians who were pending trial by courts-martial.[71] Although the Court never discussed exhaustion in these cases, it later surmised that the doctrine was deemed inappropriate because the cases involved the issue of whether, under Article I of the Constitution, "Congress could allow the military to interfere with the liberty of civilians even for the limited purpose of forcing them to answer to the military justice system."[72]

(3) In Noyd v. Bond,[73] the Court extended the exhaustion requirement to extraordinary remedies available from the United States Court of Military Appeals (COMA). The petitioner, Noyd, was convicted by court-martial of willful disobedience and sentenced to one year's confinement at hard labor. While

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[70]Id. at 131-32.

[71]See, e.g., McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).

[72]Schlesinger v. Councilman, 420 U.S. 738, 759 (1975).

[73]395 U.S. 683 (1969).

appealing his conviction in the military courts, Noyd sought habeas relief from the federal courts, challenging the authority of the military to confine him pending the appeal of his conviction. Finding that Noyd did not seek extraordinary relief from the COMA, the Court affirmed the lower courts' denial of habeas relief.[74]

(4) Three years after its decision in Noyd, the Court limited the application of the exhaustion doctrine in Parisi v. Davidson.[75] Parisi involved a habeas petition from an administrative denial of a conscientious objector application. Subsequent to the filing of the lawsuit, the petitioner, Parisi, disobeyed an order to board a plane for Vietnam. When court-martial charges were preferred against him, the district court stayed its adjudication of the habeas petition, relying on the doctrine of exhaustion. The Supreme Court held this was error. Because the military courts could not adjudicate Parisi's conscientious objector application, and because a favorable resolution of that claim would be dispositive of the court-martial charges, no cogent basis existed for application of the exhaustion doctrine.[76]

(5) Thus, the Court's decisions in Gusik and Noyd firmly entrenched the exhaustion doctrine as a prerequisite to collateral review of courts-

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[74]See United States ex rel. Becker v. Semmons, 357 F. Supp. 1135 (E.D. Wis. 1973).

[75]405 U.S. 34 (1972).

[76]See Cooper v. Marsh, 807 F.2d 988 (Fed. Cir. 1986) (plaintiff need not pursue administrative remedies incapable of providing relief). Compare Woodrick v. Hungerford, 800 F.2d 1413 (5th Cir. 1986) (petitioner claiming breached enlistment contract can be court-martialed for failure to report), cert. denied, 481 U.S. 1036 (1987); Cole v. Commanding Officer, 747 F.2d 217 (4th Cir. 1984) (en banc) (conscientious objector applicant can be court-martialed for disobedience of orders pending processing of application); Conrad v. Schlesinger, 507 F.2d 867 (9th Cir. 1974) (conscientious objector applicant can be court-martialed for narcotics offense pending processing of application).

martial.[77] Parisi did not modify the doctrine; it simply held that court-martial proceedings should not interfere with the orderly adjudication of an antedated and independent federal lawsuit challenging an administrative determination of a conscientious objector claim. By considering the administrative claim, federal courts only indirectly affect the proceedings of the military tribunals.

(6) Since Gusik, the most serious threat to the orderly operation of the military courts has come from servicemembers seeking to enjoin court-martial proceedings on the basis of various jurisdictional and constitutional claims. Although such lawsuits have been reported from as early as World War II,[78] they began in earnest about the time of the Vietnam War. For example, in Levy v. Corcoran,[79] the United States Circuit Court of Appeals for the District of Columbia denied Captain Howard Levy's petition for stay of his court-martial on charges of violating articles 133 and 134 of the Uniform Code of Military Justice. Levy contended that the statutes were unconstitutional. The circuit court dismissed the petition on several grounds, including the absence of equity jurisdiction to interfere with the military proceedings, the existence of an adequate remedy at law through the mechanisms provided by the military justice system, and Captain Levy's inability to establish irreparable injury.

(7) The real impetus for injunction claims was the Supreme Court's decision in O'Callahan v. Parker,[80] in which the Court limited the subject-matter

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[77]E.g., Williams v. Sec'y of Navy, 787 F.2d 552, 558-62 (Fed. Cir. 1986); Sisson v. United States, 736 F.2d 1275 (9th Cir. 1984).

[78]In re Meader, 60 F. Supp. 80 (E.D.N.Y. 1945) (court refused to enjoin court-martial on ground Navy intended to use certain illegally seized evidence against accused).

[79]389 F.2d 929 (D.C. Cir.), cert. denied, 389 U.S. 960 (1967).

[80]395 U.S. 258 (1968), overruled, Solorio v. United States, 483 U.S. 435 (1987).

jurisdiction of the military courts to "service-connected" crimes. O'Callahan started a raft of lawsuits challenging pending courts-martial on "service-connection" grounds. The lower courts disagreed as to the proper disposition of such claims, some holding injunctive relief was proper because of the absence of court-martial jurisdiction,[81] while other courts, relying on the doctrines of exhaustion and abstention, denied relief.[82]

(8) The controversy ended in 1975, with the Supreme Court's decisions in Schlesinger v. Councilman,[83] and McLucas v. De Champlain.[84] Relying on the dual considerations of comity--the necessity of respect for coordinate judicial systems--and the doctrine of exhaustion of remedies, the Court, in Councilman, reversed the judgment of lower federal courts that had enjoined an impending court-martial proceeding on the basis that the offenses charged were not "service-connected." Justice Powell, writing for the Court, observed that the unique relationship between military and civilian society counsels strongly against the exercise of equity power to enjoin courts-martial in much the same manner that the peculiar demands of federalism preclude equitable intervention by the federal courts in state criminal proceedings.[85] Similarly, the practical considerations supporting the exhaustion requirement--the need to allow agencies to develop the facts in which they are peculiarly expert, to correct their own errors, and to avoid duplicative or needless judicial proceedings--compel

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[81]See, e.g., Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973), rev'd sub nom. Schlesinger v. Councilman, 420 U.S. 738 (1975); Cole v. Laird, 468 F.2d 829 (5th Cir. 1972); Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969).

[82]See, e.g., Dooley v. Plogar, 491 F.2d 608 (4th Cir. 1974); Sedivy v. Richardson, 485 F.2d 1115 (3d Cir. 1973), cert. denied, 421 U.S. 910 (1975).

[83]420 U.S. 738 (1975).

[84]421 U.S. 21 (1975).

[85]Schlesinger, 420 U.S. at 756-57.

nonintervention in ongoing court-martial proceedings.[86] Justice Powell concluded that these considerations militate strongly against judicial interference with pending courts-martial:

> [I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights. We have recognized this, as well as the practical considerations common to all exhaustion requirements, in holding that federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted. . . . The same principles are relevant to striking the balance governing the exercise of equity power. We hold that when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise.[87]

(9) Later the same year, the Court applied its Councilman holding in McLucas v. De Champlain, in which a federal district court had enjoined a court-martial on constitutional grounds. The plaintiff, De Champlain, was an Air Force master sergeant who was charged with copying and attempting to deliver to an unauthorized person--that is, a Soviet embassy official in Thailand--certain classified documents. The Air Force placed restrictions on De Champlain's civilian counsel's access to the classified records. These restrictions were challenged by De Champlain in the district court. Holding the restrictions "clearly excessive," the district judge ordered the court-martial restrained unless unlimited access to all documents was given to De Champlain's civilian counsel and his staff. The Supreme Court reversed the district court's decision.

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[86] Id.

[87] Id. at 758.

Relying on Councilman, it held that the restrictions placed on De Champlain's counsel's access to the classified documents could not support an injunction of the court-martial proceedings:

> As to this claim, however, the only harm De Champlain claimed in support of his prayer for equitable relief was that, if convicted, he might remain incarcerated pending review within the military system. Thus, according to De Champlain, intervention is justified now to ensure that he receives a trial free of constitutional error, and to avoid the possibility he will be incarcerated, pending review, on the basis of a conviction that inevitably will be invalid. But if such harm were deemed sufficient to warrant equitable interference into pending court-martial proceedings, any constitutional ruling at the court-martial presumably would be subject to immediate relitigation in federal district courts, resulting in disruption to the court-martial and circumvention of the military appellate system provided by Congress.[88]

(10) With the Supreme Court's decisions in Gusik, Noyd, Councilman, and De Champlain, the application of the doctrine of exhaustion of remedies to court-martial proceedings is presently well-settled.[89]

8.5 **The Doctrine of Waiver.**

a. General. The doctrine of waiver is one of forfeiture: where a claimant fails to raise an issue in military court proceedings, he is barred from raising the issue in a

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[88]McLucas, 421 U.S. at 33.

[89]See, e.g., Williams v. Sec'y of Navy, 787 F.2d 552, 558-62 (Fed. Cir. 1986); Sisson v. United States, 736 F.2d 1275 (9th Cir. 1984); Bowman v. Wilson, 672 F.2d 1145 (3d Cir. 1982); Baxter v. Claytor, 652 F.2d 181 (D.C. Cir. 1981); Kaiser v. Sec'y of Navy (E.D. Pa. 1980), aff'd, 649 F.2d 859 (3d Cir.), cert. denied, 454 U.S. 820 (1981); United States ex rel. Cummings v. Bracken, 329 F. Supp. 384 (S.D. Tex. 1971). Accord Wickham v. Hall, 706 F.2d 713 (5th Cir. 1983).

subsequent collateral challenge in the federal courts. Waiver generally entails a procedural default. The doctrine arises where the failure to assert an issue during the course of military proceedings precludes subsequent adjudication of the issue in a military forum.

b. Waiver Before Burns v. Wilson. Since the early 19th Century, the civilian courts have applied waiver principles in collateral challenges to court-martial proceedings. However, this application was never entirely consistent. As a general rule, nondiscretionary statutory prerequisites for jurisdiction, such as the minimum size of the court, the character of the membership, and the existence of jurisdiction over the subject-matter and the accused, could not be waived. The theory was that jurisdiction could not be created by consent.[90] Alternatively, potential jurisdictional requirements, which were partially discretionary in nature, such as size of a court-martial within its statutory limits and other matters of defense, could be waived.[91]

c. Waiver Under Burns v. Wilson. After the Supreme Court's decision in Burns, and when application of the "full and fair" consideration test was at its height, claims not raised in military courts were not considered when presented for the first time in collateral proceedings. As the Tenth Circuit succinctly noted in Suttles v. Davis:[92]

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[90]See, e.g., Ver Mehren v. Sirmyer, 36 F.2d 876 (8th Cir. 1929); United States v. Brown, 41 Ct. Cl. 275 (1906), aff'd, 206 U.S. 240 (1907).

[91]See, e.g., Mullan v. United States, 212 U.S. 516 (1909); Bishop v. United States, 197 U.S. 334 (1905); Aderhold v. Memefee, 67 F.2d 345 (5th Cir. 1933).

[92]215 F.2d 760, 763 (10th Cir.), cert. denied, 348 U.S. 903 (1954. See also Harris v. Ciccone, 417 F.2d 479, 484 (8th Cir. 1969), cert. denied, 397 U.S. 1078 (1970); United States ex rel. O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968), rev'd on other grounds, 395 U.S. 258 (1969); Branford v. United States, 356 F.2d 876 (7th Cir. 1966); Kubel v. Minton, 275 F.2d 789 (4th Cir. 1960).

"Obviously, it cannot be said that [the military courts] have refused to fairly consider claims not asserted."

d. Waiver After the Demise of Burns v. Wilson.

(1) With the demise of the "full and fair" consideration test and the concomitant expansion of collateral review, the courts turned to civilian habeas jurisprudence for an alternative waiver doctrine. From 1963 until the mid-1970s, application of the doctrine of waiver was governed in the civilian sphere by the Supreme Court's decision in Fay v. Noia.[93] In Fay, the Court ruled that a federal habeas court is not precluded from reviewing a federal constitutional claim simply because the habeas petitioner failed to raise the issue in the state courts. The Court blunted its ruling to some extent by developing the so-called "deliberate bypass" rule; that is, where a petitioner deliberately bypassed the orderly procedure of the state courts by failing to raise his claim, the federal habeas judge had the discretion to deny relief. A number of federal courts applied the Fay "deliberate bypass" rule in collateral proceedings from military convictions.[94]

(2) In a series of decisions beginning in 1973, the Supreme Court began chipping away at the Fay v. Noia "deliberate bypass" test, and charted a course

[93]375 U.S. 391 (1963).

[94]See, e.g., Angle v. Laird, 429 F.2d 892, 894 (10th Cir. 1970, cert. denied, 401 U.S. 918 (1971). See generally P. Bator et al., The Federal Courts and the Federal System 1481-87 (2d ed. 1973).

that would significantly restrict the availability of habeas relief. In Davis v. United States,[95] the Supreme Court denied collateral relief to a federal prisoner, who had challenged the makeup of the grand jury which indicted him, because he had failed to preserve the issue by a motion before his trial as required by the criminal procedure rules. The Court held that absent a showing of cause for the noncompliance and some demonstration of actual prejudice, the claim would be barred in a collateral proceeding. Three years later, in Francis v. Henderson,[96] the Supreme Court was faced with a similar challenge to a grand jury by a state prisoner, who had failed to preserve the issue in the state courts. Following its decision in Davis, the Court held that the petitioner was barred from raising his claim in a federal habeas proceeding, unless he could show cause for his failure to preserve the issue in the state courts and demonstrate actual prejudice.

(3) Whatever vitality was left in the "deliberate bypass" rule was virtually gutted by subsequent Supreme Court decisions in Wainwright v. Sykes,[97] and Engle v. Isaac.[98] In Sykes, the Court held that the "cause and actual prejudice" standard set forth in Davis and Francis also applied to a defendant who failed to object to the admission of an allegedly illegally-procured confession at his state trial. The Court expressly noted that the "cause and prejudice" standard was narrower than the "deliberate bypass" rule of Fay. In Engle, the Supreme Court applied the "cause and prejudice" test to bar a habeas claim based on state courts' improper allocation of the

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[95]411 U.S. 233 (1973).

[96]425 U.S. 536 (1976).

[97]433 U.S. 72 (1977).

[98]456 U.S. 107 (1982). See generally Comment, The Burger Court & Federal Review for State Habeas Corpus Petitioners After Engle v. Isaac, 31 Kan. L. Rev. 605 (1983).

burden of proof. The Court reaffirmed its adherence to the standard "that any prisoner bringing a constitutional claim to the federal courthouse after state procedural default must demonstrate cause and actual prejudice before obtaining relief"[99] or demonstrate that failure to consider the claim would result in a "fundamental miscarriage of justice."[100]

The Supreme Court's cases since Sykes have consistently applied the "cause and prejudice" standard to the failure to raise a particular claim in the state court proceedings.[101] For years, however, the Court left open the question of whether the Fay "deliberate bypass" standard continued to apply where, as in Fay, the state petitioner had defaulted the entire appeal.[102] In Harris v. Reed,[103] the Court strongly

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[99]456 U.S. at 129. See Morris v. Kemp, 809 F.2d 1499 (11th Cir. 1987); Way v. Wainwright, 786 F.2d 1095 (11th Cir. 1986); Young v. Herring, 777 F.2d 198, 203 (5th Cir. 1985); Booker v. Wainwright, 764 F.2d 1371, 1379 (11th Cir.), cert. denied, 474 U.S. 975 (1985); Cantone v. Superintendent New York Correctional Facility, 759 F.2d 207, 218 (2d Cir.), cert. denied, 474 U.S. 835 (1985); Wiggins v. Procunier, 753 F.2d 1318, 1321 (5th Cir. 1985); Leroy v. Marshall, 757 F.2d 94, 97-100 (6th Cir.), cert. denied, 474 U.S. 831 (1985).

Because Wainwright v. Sykes did not expressly overrule Fay v. Noia, whether Fay had any lasting effect was unclear for a considerable period of time. Some courts, notably the Tenth Circuit, limited Fay to its facts, applying its "deliberate bypass" rule to instances when the habeas petitioner had not sought an appeal in the state courts. See Holcomb v. Murphy, 701 F.2d 1307, 1310 (10th Cir.), cert. denied, 463 U.S. 1211 (1983). Other courts, like the Sixth Circuit, distinguished decisions normally made by the criminal defendant's counsel with consultation with the defendant and those made without consultation, and applied the Fay "deliberate bypass" test to the former. Maupin v. Smith, 785 F.2d 135, 138 n.2 (6th Cir. 1986); Crick v. Smith, 650 F.2d 860, 867 (6th Cir. 1981), cert. denied, 455 U.S. 922 (1982). Other courts abandoned the Fay standard. E.g., Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905 (9th Cir. 1986). The Supreme Court, in Coleman v. Thompson, 501 U.S. 722 (1991), resolved the split, expressly holding that the deliberate bypass standard applied "[i]n all cases." Id. at 750.

[100]456 U.S. at 135.

[101]See Harris v. Reed, 489 U.S. 255 (1989); Murray v. Carrier, 477 U.S. 478 (1986).

[102]See Murray, 477 U.S. at 492.

hinted that Fay had been overruled. In Coleman v. Thompson,[104] the Supreme Court took the last step and expressly announced the complete demise of the "deliberate bypass" standard:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Fay was based on a conception of federal/state relations that undervalued the importance of state procedural rules. The several cases after Fay that applied the cause and prejudice standard to a variety of state procedural defaults represent a different view. We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.

(4) Generally, waiver under the "cause and prejudice" standard is dependent on a federal or state procedural rule that requires assertion of a claim, defense, or objection at a particular point in a criminal proceeding and, absent assertion, mandates waiver of the claim, defense, or objection.[105] Examples of procedural default rules in courts-martial are Military Rules of Evidence 304(d)(2)(A) (admission of evidence obtained in violation of right against self-incrimination), 312(d)(2)(A)

(..continued)
[103]489 U.S. at 262.

[104]501 U.S. 722, 750 (1991).

[105]See, e.g., Engle v. Isaac, 456 U.S. 107, 129 (1982); Washington v. Lane, 840 F.2d 443 (7th Cir. 1988); Alexander v. Dugger, 841 F.2d 371 (11th Cir. 1988) (cause and prejudice standard applies to pro se litigants). Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986); Spencer v. Kemp, 781 F.2d 1458, 1463 (11th Cir. 1986). Some courts require that the state procedural rule serve a legitimate state interest. Maupin, 785 F.2d at 138. See generally Henry v. Mississippi, 379 U.S. 443, 446-48 (1965).

(admission of evidence obtained in violation of right against unlawful searches and seizures), and 321(a)(2) (admission of evidence of unlawful eyewitness identification). When a state or federal court reviews a nonasserted claim, defense, or objection on its merits despite a procedural default rule, a federal court may similarly review the merits of the claim, defense, or objection in a collateral proceeding.[106] If, however, the federal or state court rejects a nonasserted claim, defense, or objection both because of a lack of merit and because of the petitioner's failure to abide by the applicable procedural rule, most federal courts will deem the claim, defense, or objection waived in a subsequent collateral proceeding.[107] Finally, if a habeas petitioner presents the

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[106]See Ulster County Court v. Allen, 442 U.S. 140 (1979); Harris v. Reed, 822 F.2d 684 (7th Cir. 1987), rev'd, 489 U.S. 255 (1989); Walker v. Endell, 828 F.2d 1378 (9th Cir. 1987); Cooper v. Wainwright, 807 F.2d 881, 886 (11th Cir. 1986); Hux v. Murphy, 733 F.2d 737 (10th Cir. 1984), cert. denied, 471 U.S. 1103 (1985); Phillips v. Smith, 717 F.2d 44 (2d Cir. 1983), cert. denied, 465 U.S. 1027 (1984). Cf. Adams v. Dugger, 816 F.2d 1493, 1497 (11th Cir. 1987) (state should have waived procedural bar); Smith v. Bordenkircher, 718 F.2d 1273 (4th Cir. 1983), cert. denied, 466 U.S. 976 (1984) (review proper where state courts would not apply procedural default rule). But see Puleio v. Vose, 830 F.2d 1197, 1200 (1st Cir. 1987) (a nonasserted procedural claim which is thereby waived is not cured for federal court review in a habeas corpus proceeding, where the state court reviewed the claim under a standard different from that which would be used by the federal court).

[107]See Harris v. Reed, 489 U.S. 255, 264 n.10 (1989). However, the state or federal court must "clearly and expressly" state that its judgment rests on the procedural bar. Id. at 263. See also United States ex rel. Weismiller v. Lane, 815 F.2d 1106, 1109 (7th Cir. 1987); Phillips v. Lane, 787 F.2d 208, 211 (7th Cir. 1986); Goins v. Lane, 787 F.2d 248, 251 (7th Cir. 1986); Davis v. Allsbrooks, 778 F.2d 168, 175 (4th Cir. 1985). Cf. McBee v. Grant, 763 F.2d 811, 813 (6th Cir. 1985) (merits of claim, defense, or objection waived if procedural default was at least a "substantial basis" for the decision). But see Hux v. Murphy, 733 F.2d 737 (10th Cir. 1984), cert. denied, 471 U.S. 1103 (1985).

"substance" of a federal constitutional claim to a state or federal court and the court ignores the claim, the claim is not waived.[108]

(5) Waiver under the "cause and prejudice" standard may also result when a habeas petitioner fails to develop material facts relating to the petitioner's federal claim. In Keeney v. Tamayo-Reyes,[109] the petitioner, a Cuban immigrant with little education and almost no knowledge of English, claimed his plea of nolo contendere in state court was invalid because his court-appointed translator failed to translate the mens rea element of the crime fully and accurately. The record showed that the petitioner had failed to develop adequately the facts concerning the translation at the state court hearing. The Supreme Court held that the petitioner must establish "cause and prejudice" for such failure to be entitled to a federal evidentiary hearing, unless the petitioner can show that a "fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."[110]

(6) Once a federal habeas court determines that a petitioner failed to bring a claim in state court or failed to develop the factual basis for the claim in the state forum, the petitioner must show cause for failing to assert properly or develop the claim and actual prejudice from the alleged error.[111] Alternatively, a petitioner may

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[108]See Anderson v. Harless, 459 U.S. 4 (1982); Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990); United States ex rel. Sullivan v. Fairman, 731 F.2d 450, 453 (7th Cir. 1984).

[109]504 U.S. 1 (1992).

[110]Id. at 11.

[111]See, e.g., Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994); Snell v. Lockhart, 14 F.3d 1289, 1297 (8th Cir.), cert. denied, 115 S. Ct. 419 (1994); Noltie v. Peterson, 9 F.3d 802, 804 (9th Cir. 1993); Resnover v. Pearson, 965 F.2d 1453, 1458 (7th Cir. 1992), cert. denied, 508 U.S. 962 (1993).

obtain collateral review by showing "that failure to consider the claims will result in a fundamental miscarriage of justice."[112]

(7) "'Cause' is a legitimate excuse for default; 'prejudice' is actual harm resulting from the alleged constitutional violation."[113] Rather than provide these terms precise content, the federal courts have applied them on an ad hoc basis.[114] For example, in Reed v. Ross,[115] the Supreme Court found that the "novelty" of a constitutional claim may constitute sufficient cause for default.[116] In Murray v. Carrier,[117] the Court held that mere attorney ignorance or inadvertence is insufficient cause to avoid a procedural default;[118] however, if an attorney's performance falls

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[112]Coleman v. Thompson, 501 U.S. 722, 750 (1991). See Sawyer v. Whitley, 112 S. Ct. 2514 (1992).

[113]Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir. 1984), cert. denied, 490 U.S. 1068 (1989). See Preston v. Maggio, 741 F.2d 99, 101 (5th Cir. 1984), cert. denied, 471 U.S. 1104 (1985).

[114]See Farmer v. Prast, 721 F.2d 602, 606 n.6 (7th Cir. 1983) (citing Engle, supra note 102, for proposition that "cause and prejudice" are not rigid terms but take their meaning from principles of federalism and comity and the need for finality in criminal litigation).

[115]468 U.S. 1 (1984).

[116]See also United States v. Griffin, 765 F.2d 677, 682 (7th Cir. 1985). Accord Weaver v. McKaskle, 733 F.2d 1103, 1106 (5th Cir. 1984).

[117]477 U.S. 478 (1986).

[118]See United States ex rel. Weismiller v. Lane, 815 F.2d 1106, 1109 (7th Cir. 1987); Jones v. Henderson, 809 F.2d 946, 950 (2d Cir. 1987); Cartee v. Nix, 803 F.2d 296, 380-81 (7th Cir. 1986), cert. denied, 480 U.S. 938 (1987).

below minimum constitutional standards,[119] cause may be inferred.[120] The element of prejudice is similarly fact-specific.[121]

(8) The Tenth Circuit, in Wolff v. United States,[122] applied the "cause and prejudice" standard to a habeas petitioner challenging, for the first time, the form of immunity given a key prosecution witness at a court-martial. The petitioner's counsel at the court-martial did not object to the witness' testimony. Finding no good cause for the failure to object, the court refused to consider the merits of the claim. Importantly, the court explicitly rejected the petitioner's contention that the "cause and prejudice" standard was inapplicable in collateral attacks on courts-martial.[123] The

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[119]See Strickland v. Washington, 466 U.S. 668 (1984).

[120]Murray, 477 U.S. at 478. Where, however, there is no constitutional right to counsel (e.g., in state post-conviction proceedings), there can be no deprivation of the right to effective assistance of counsel and hence no "cause" for purposes of the test for waiver. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

[121]See, e.g., United States v. Frady, 456 U.S. 152, 168 (1982); United States ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987); Ferguson v. Knight, 807 F.2d 1239, 1242 (6th Cir. 1987); Henry v. Wainwright, 743 F.2d 761, 763 (11th Cir. 1984); Francois v. Wainwright, 741 F.2d 1275, 1283 (11th Cir. 1984). See generally Comment, Habeas Corpus--The Supreme Court Defines the Wainwright v. Sykes "Cause" and "Prejudice" Standard, 19 Wake Forest L. Rev. 441 (1983). The "plain error" rule is inapplicable in collateral proceedings. United States v. Frady, 456 U.S. 152 (1982); Henderson v. Kibbe, 431 U.S. 145 (1977).

[122]737 F.2d 877 (10th Cir.), cert. denied, 496 U.S. 1076 (1984).

[123]Id. at 879.

Wolff decision continues to be followed in the Tenth Circuit[124] and by the courts in the Ninth[125] and Federal[126] Circuits.

[124]Lips v. Commandant, U.S. Disciplinary Barracks, 997 F.2d 808 (10th Cir. 1993), cert. denied, 114 S. Ct. 920 (1994).

[125]Davis v. Marsh, 876 F.2d 1446 (9th Cir. 1989).

[126]Martinez v. United States, 914 F.2d 1486 (Fed. Cir. 1990).